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VBB on Belgian Business Law

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vbb@vbb.com
www.vbb.com

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Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

COMMERCIAL LAW

Federal Chamber of Representatives Adopts Resolution to Increase Transparency of Online Platforms and Social Media

On 6 May 2021, the federal Chamber of Representatives adopted a resolution to increase the transparency and reinforce the responsibility of online platforms and social media (*Resolutie over de nood aan meer transparantie en verantwoordelijkheidszin van de sociale media en platformen met betrekking tot online-inhoud en -informatie / Résolution visant à renforcer la transparence et la responsabilité des plateformes et médias sociaux quant aux contenus et aux informations en ligne*; the ***Resolution***).

The Resolution urges the federal Government to increase the transparency of algorithms and to fight illegal content placed online, in line with the obligations laid down by the European Commission's proposed Regulation on a Single Market for Digital Services of December 2020 (*See*, VBB on Competition Law, Volume 2020, No. 12, p. 15) (the ***EU Digital Services Act***).

The Resolution specifically asks the Government to call at the EU level for the following measures: (i) require large online platforms to implement a mechanism for handling complaints related to illegal online content; (ii) lay down an obligation for large online platforms to publish bi-annual reports attesting to their compliance with their transparency obligations; (iii) require large online platforms to operate regular risk assessments; (iv) create a list of "trusted flaggers", *i.e.*, parties empowered to report manifestly illegal content to online platforms more rapidly; (v) apply the provisions of the criminal code in equal fashion to online and offline offences; (vi) provide for an enforcement system against online platforms which repeatedly and systematically breach their supervisory duties and transparency obligations and for a right of legal recourse against online platforms failing to respond to their complaints; (vii) participate in the establishment of a European digital observatory pursuant to the EU Digital Services Act; and (viii) as regards political advertising, implement a label for sponsored advertisements published on large online platforms indicating the identity of the organisation that sponsored the advertisement.

The Resolution also underlines the need for providing the administrative and judicial staff with adequate training, means and equipment to respond to online infringements in the most effective way.

Finally, the Resolution requests the Government to reflect on solutions to the targeted advertising of minors under the age of sixteen.

The EU Digital Services Act is currently under review by the European Parliament and the Council of the European Union. If adopted, it will primarily be enforced by the EU Member States, which will cooperate in supervising the online platforms, while the European Commission will retain supervisory powers. The EU Member States will have the power to impose fines on non-compliant online platforms.

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COMPETITION LAW

Council of Ministers Announces New Amendments to Belgian Competition Law

On 21 May 2021, the Federal Council of Ministers (*Ministerraad / Conseil des ministres*) approved a draft bill that will implement in Belgian law Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (known as the "ECN+ Directive") (*Voorontwerp van wet tot omzetting van Rijchtlijn (EU) van het Europees Parlement en de Raad van 11 december 2018 tot toekenning van bevoegdheden aan de mededingingsautoriteiten van de lidstaten voor een doeltreffendere handhaving en ter waarborging van de goede werking van de interne markt / Avant-projet de loi transposant la directive (UE) 2019/1 du Parlement européen et du Conseil du 11 décembre 2018 visant à doter les autorités de concurrence des Etats membres des moyens de mettre en œuvre plus efficacement les règles de concurrence et à garantir le bon fonctionnement du marché intérieur*; the ***Draft Bill***).

According to the Council of Ministers, the Draft Bill will also strengthen the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; ***BCA***) and address difficulties which the BCA faces in the application of the Code of Economic Law (*Wetboek van Economisch Recht / Code de droit économique*). The Draft Bill introduces several amendments to the Code of Economic Law as well as an amendment to the Criminal Code.

The Draft Bill has been submitted for review to the Council of State (*Raad van State / Conseil d'Etat*).

Belgian Competition Authority Publishes Annual Report for 2020

On 18 May 2021, the Belgian Competition Authority *(Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; ***BCA***) published its annual report for the year 2020.

Antitrust Decisions and Investigations

The BCA issued only one antitrust decision on the merits in 2020 in a case involving Brussels Airlines and Thomas Cook. While the BCA concluded that an anticompetitive agreement existed, it did not impose a fine (*See*, this Newsletter, Volume 2020, No 6, p. 6).

The BCA also adopted eight decisions concerning requests for interim measures, a sharp increase from 2019 when the BCA only took two such decisions. These decisions include two interpretative decisions and concern five cases. The BCA refused to impose interim measures in only one case, *DPI v. HP* (*See*, this Newsletter, Volume 2020, No 3, p. 5).

Finally, the BCA carried out seven investigations in 2020, a decrease compared to the eleven investigations which the BCA handled in 2019. Six of these investigations concern anticompetitive agreements and the last one is about a possible abuse of dominant position. Four out of the seven investigations were launched following a complaint or a specific request. The BCA did not carry out any on-premise inspections in 2020.

Merger Control Decisions and Guidance

The BCA cleared 25 transactions under the simplified procedure. It also adopted four decisions in the first phase of the merger control procedure, authorising three mergers without conditions and one with conditions (in the *Kinepolis* saga – *See*, this Newsletter, Volume 2020, No 2, p. 3). The BCA also conditionally cleared a merger following a second phase in-depth probe. The other merger notification that reached phase two in 2020 (between flour producers Dossche Mills SA and Ceres SA) was withdrawn, as the parties abandoned the transaction.

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The BCA also carried out an informal investigation into the reform of hospital networks in Belgium. This resulted in a note on the application of the Belgian merger control rules to the creation of local hospital networks (*See*, this Newsletter, Volume 2020, No 7, p. 4). This note in turn prompted a law to exclude the creation of hospital networks from the application of the merger control rules (*See*, this Newsletter, Volume 2021, No 2, p. 7 and Volume 2021, No 3, p. 4).

Formal Opinions

In 2020, the BCA issued a formal opinion on two draft decisions of the Council of the Belgian Institute for Postal Services and Telecommunications concerning the review of one-time fees and the reference offer of Belgian incumbent telecommunications operator Proximus regarding IP interconnection.

The BCA also delivered to the Belgian Federal Ministry of Economy (*FOD Economie / SPF Economie*) a formal opinion on the European Commission's White Paper on levelling the playing field as regards foreign subsidies.

Communications, Guidelines and Advocacy

On 6 May 2020, the BCA adopted new leniency guidelines and a new communication discussing the informal opinions of the President of the BCA (*See*, this Newsletter, Volume 2020, No 5, pp. 3-4). The BCA's new fining guidelines, adopted on the same date, were soon replaced by another version, which also applies to abuses of economic dependence (*See*, this Newsletter, Volume 2020, No 5, p. 4 and this Newsletter, Volume 2020, No 9, p. 3).

The BCA is also working with the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données*) on the conclusion of a cooperation agreement between them.

Finally, the annual report includes the BCA's enforcement priorities for 2021, which were published earlier this year (*See*, this Newsletter, Volume 2021, No 3, p. 3).

Belgian Competition Authority Closes Investigation into Carrefour and Provera

On 28 April 2021, the Belgian Competition Authority (*Belgische Mededingingsautoriteit / Autorité belge de la Concurrence*; ***BCA***) closed its investigation into the purchasing alliance between retailer Carrefour and Provera, the purchasing arm of retailer Louis Delhaize, following the commitments offered by the parties.

On 6 May 2019, the BCA had launched, of its own motion, an investigation into the purchasing agreement concluded in November 2018 between Carrefour Belgium and Provera. This agreement governs branded products of 140 suppliers, mostly "*must-carry*" brands, as well as a limited number of low-price products. The BCA carried out dawn raids in May 2019 at the premises of both parties. The BCA suspected that the mandate given by Provera to Carrefour to negotiate the purchasing conditions on behalf of both parties, and the exchange of sensitive information between them, might restrict competition both on the upstream procurement market and on the downstream retail market.

The parties offered commitments to address the BCA's concerns. Carrefour committed to transfer its purchasing department to a separate legal entity, and to take the necessary measures to ensure that this entity would be isolated from other Carrefour departments. The parties also offered to establish procedures for the exchange of information between them. Finally, the parties committed to change their negotiation procedure, which, according to the press release published on 6 May 2021 by the BCA, will "*ensure that joint negotiations will* […] *be limited to the strictly financial aspect, allowing each party to define its own commercial strategy in complete independence*."

These commitments were market-tested in January 2021. According to the BCA, the commitments "*have been considered by the majority of interviewed suppliers to address the BCA's concerns, even if they will be watchful about the effective implementation of these commitments by Carrefour and Provera*". The BCA accepted the commitments and made them binding for the duration of the buying alliance, which allows the BCA to close the case without taking a position on the existence of an infringement of the competition rules.

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DATA PROTECTION

Belgian Data Protection Authority Approves First European Code of Conduct

On 20 May 2021, the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données*; the ***DPA***) approved for the first time since the entry into force of the General Data Protection Regulation (EU) 2016/679 (the ***GDPR***) a transnational code of conduct to be adopted within the European Union. The "EU Data Protection Code of Conduct for Cloud Service Providers" (the ***EU Cloud CoC***) aims to establish good data protection practices for cloud service providers and seeks to contribute to a better protection of personal data processed in the cloud in Europe. One day earlier, on 19 May 2021, the European Data Protection Board had already issued a favourable opinion, allowing the Belgian DPA to approve the EU Cloud CoC.

The objective of the EU Cloud CoC is to help cloud service providers demonstrate compliance with Article 28 of the GDPR and making it easier and more transparent for customers to analyse whether cloud services are appropriate for their use case and in line with Articles 28(1) and 28(5) of the GDPR. Article 28(1) of the GDPR provides that controllers only use processors providing "sufficient guarantees" to ensure compliance with the GDPR. Article 28(5) states that the adherence of a processor to an approved code of conduct may be used as an element that serves to demonstrate the existence of sufficient guarantees as referred to in paragraphs 1 and 4 of Article 28 of the GDPR. In its approval decision, the DPA underlines the importance of codes of conduct as voluntary accountability tools to tailor data protection rules to the specificities of a sector. By adhering to the code, companies will ensure that data handling is in line with the GDPR. Adherence to the EU Cloud CoC is also achievable for small and medium-sized enterprises that are active in this sector.

The EU Cloud CoC is intended to address all service types of the cloud market (such as IaaS, PaaS, and SaaS, the three main types of cloud computing) and defines specific requirements for cloud service providers. The code only applies to cloud services for which the cloud service provider is acting as a processor. It therefore does not apply to "business to consumer" (B2C) services or to any processing activities for which the cloud service provider may act as a data controller. Furthermore, the DPA clarifies that customers and cloud service providers who transfer personal data to a third country outside the EEA, will remain responsible to assess the individual appropriateness of implemented safeguards according to Chapter V of the GDPR.

Parallel to the approval of the EU Cloud CoC, the DPA accredited SCOPE Europe as its monitoring body.

The DPA's approval decision is available here.

Employer Held Responsible for Unauthorised Access to Credit Information by Employee

On 26 April 2021, the Litigation Chamber (*Geschillenkamer / Chambre Contentieuse*; the ***Litigation Chamber***) of the Belgian Data Protection Authority (*Gegevensbeschermingsautoriteit / Autorité de protection des données*; the ***DPA***) imposed a EUR 100,000 fine on an unnamed firm active in financial services for failing to shield access to the Central Individual Credit (***CCP***) register of the National Bank of Belgium (***NBB***) against unauthorised employee access.

Factual Background

In April 2019, an individual (***Complainant***) noticed that her personal data contained in her credit file held at the NBB's CCP register had been accessed on multiple occasions between 2016 and 2018 by an entity active in the financial services sector (***Defendant***). The Complainant had no open credit file with the Defendant during the period in which her file had been accessed. However, the Complainant's former husband worked as an executive for the Defendant and had allegedly abused this position to access the information unlawfully and use it for financial discussions in the couple's divorce proceedings which allegedly caused the Complainant financial and moral damage.

The Complainant requested the Litigation Chamber to (i) order the Defendant to provide a summary of the information that had been accessed by the Defendant, including

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the dates of access, the identity of the individuals who accessed the information and whether that access was lawful; (ii) order the Defendant to implement appropriate measures to ensure the security of its processing activities; and (iii) impose a fine on the Defendant.

Decision

The Litigation Chamber pointed out that the decision at issue would pertain to the responsibility of the Defendant, *i.e.*, the legal entity which is the employer of the former husband, and that the responsibility of the former husband would be dealt with separately. Although the latter was responsible for the unlawful access, the principle of accountability required the Defendant to implement appropriate technical and organisational measures to prevent unauthorised processing of personal data by its employees. The Litigation Chamber found that the Defendant had failed in this obligation.

The DPA considered the absence of an *ex post* control system on the access that had taken place to be a serious infringement of Article 32 of the General Data Protection Regulation (EU) 2016/679 (the ***GDPR***). This provision requires data controllers and data processors to implement technical and organisational measures that ensure a level of data security appropriate for the level of risk presented by processing personal data. In this regard, the Litigation Chamber recommended that data controllers should ensure that log files are maintained as best practice to support the principle of data availability, and by extension the principles of data confidentiality and integrity.

The DPA ordered the Defendant to ensure that access to the CCP register comply with Articles 5(1)(f) and 32 of the GDPR, and provide the DPA with a report on the measures it would implement within a period of three months. Moreover, the DPA imposed a fine of EUR 100,000 for the violation of the above provisions given the sensitive nature of the data processed by the Defendant at a large scale, the seriousness and duration of the employee's access and the fact that the infringement would have continued had the Defendant not been informed by the Complainant.

The DPA decision is currently only available in French.

European Data Protection Board Statement on Draft Data Governance Act

On 19 May 2021, the European Data Protection Board (***EDPB***) adopted at its 49th Plenary Session a Statement on the proposed Data Governance Act (***DGA***). The statement reiterates the concerns which the EDPB and the European Data Protection Supervisor (***EDPS***) raised in a joint opinion on the DGA (*See*, this Newsletter, Volume 2021, No. 3, p. 12). The statement further emphasises the necessity for consistency between the DGA and the existing EU data protection legislation. The EDPB articulates several recommendations to remove these inconsistencies. For example, the EDPB is of the opinion that the 'interplay' between the DGA and the General Data Protection Regulation (EU) 2016/679 (***GDPR***) should be clarified under Article 1 of the DGA. The definitions and terminology used in the DGA should also be brought in line with the GDPR and the DGA should clarify, without any ambiguity, that the processing of personal data should always be based on an appropriate legal basis under Article 6 of the GDPR.

The EDPB expresses the regret that EU legislators have not followed its advice to align critical concepts of the DGA with those of the GDPR and not to weaken the checks and safeguards for data subjects of the GDPR. Furthermore, EDPB urges the legislators to avoid enacting a parallel set of rules for the DGA that are inconsistent with the GDPR. For example, the DGA should not create new grounds for the processing of personal data.

The EDPB's statement on the DGA can be found here.

European Data Protection Board Adopts Recommendations on Legal Basis For Storing Credit Card Data to Further Online Transactions

On 19 May 2021, the European Data Protection Board (***EDPB***) adopted its recommendations 02/2021 on the legal basis for the storage of credit card data for the sole purpose of furthering online transactions. The recommendations do not cover payment institutions operating in online stores or public authorities. The storage of credit card data for any other purpose, such as complying with a legal obligation or establishing a recurring payment in cases of a contract of continuing performance or subscription for a long-term service, is also not covered by the recommendations.

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In its recommendation, the EDPB indicates that consent can be the only ground for related data processing. The EDPB recommends that the consent of the data subject should be obtained before storing data when an individual uses a credit card to pay for a product or service via a website or application. In such cases, the EDPB considers that if this is a unique transaction, the individuals do not have a reasonable expectation that their credit card data will be stored for longer than necessary to complete the transaction. The EDPB does not consider that keeping credit card data for future transactions is necessary to pursue the data controller's legitimate interest or that of a third party. Consequently, the controller cannot rely on "legitimate interests" as a legal basis which explains why, as noted, the only appropriate legal basis for storing credit card data following a purchase is that of the data subject's consent.

The recommendations can be found here.

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INTELLECTUAL PROPERTY

Brussels French-Language Enterprise Court and District Court of Luxembourg Request Preliminary Ruling from Court of Justice of European Union in Connection with Possible Trade Mark Infringements Resulting from Dealings with Counterfeit Goods

On 8 and 24 March 2021, the French-language Brussels Enterprise Court (*Ondernemingsrechtbank/Tribunal de l'entreprise*) and the District Court of Luxembourg (*Tribunal d'Arrondissement*) each referred identical questions to the Court of Justice of the European Union (***CJEU***) on whether Amazon infringes Regulation 2017/1001 on the European Union Trade Mark (***Regulation 2017/1001***) when it advertises, offers, stocks and ships counterfeit goods (CJEU cases C-184/21 and C-148/21).

Factual Background and Procedure

Christian Louboutin is the owner of the position trade mark consisting of a red sole on high heel shoes (A position trade mark describes the specific way in which the mark is placed or affixed to the product). On 1 March 2019, Christian Louboutin sought injunctive relief against Amazon Europe Core sarl, Amazon EU sarl and Amazon Services Europe sarl (***Amazon***) before the French-language Brussels Enterprise Court to protect its Benelux trade mark. The Brussels Enterprise Court held that Amazon could no longer advertise signs identical to the red sole under penalty of a periodic penalty payment. Amazon appealed this judgment to the Court of Appeal of Brussels (*Hof van Beroep/ Cour d'appel*), which set it aside and held that only the advertisements relating to shoes sold by Amazon should be subject to prohibition measures.

On 19 September 2019, Christian Louboutin brought proceedings against Amazon before the District Court of Luxembourg. On 4 October 2019, Louboutin also brought proceedings before the Brussels French-language Enterprise Court against the US companies Amazon.com Inc. and Amazon Services LLC. Both Courts referred questions to the Court of Justice of the European Union (***CJEU***) in order to obtain guidance on the scope of protection afforded EU trade marks in the form of a preliminary ruling.

Questions Referred

The Brussels French-language Enterprise Court and the District Court of Luxembourg each referred a number of very similar questions to the CJEU, which can be summarised as follows:

- Must Article 9(2) of Regulation 2017/1001 be interpreted as meaning that the use of a sign identical to a trade mark displayed in a website's advertisement is attributable to its operator if, in the perception of a reasonably well informed and reasonably observant internet user, that operator played an active part in the preparation of that advertisement, or if that advertisement may be perceived by such user as forming part of that operator's own commercial communication?

  Will such a perception be influenced:

  1. by the fact that the operator is a well-known distributor of a wide range of goods including those featured in the advertisement;

  2. by the fact that the advertisement presents a heading in which the service mark of the operator is reproduced and is well-known as the distributor's trade mark;

  3. by the fact that the operator, as well as displaying that advertisement, offers services traditionally offered by distributors of goods in the same category as those featured in that advertisement?

- Must Article 9(2) of Regulation 2017/1001 be interpreted as meaning that the shipment to the final consumer without the consent of the proprietor of a trade mark and bearing a sign identical with the mark con-

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stitutes a use attributable to the shipper only if the shipper has actual knowledge that that sign has been affixed to those goods?

Is such a shipper the user of the sign concerned if the shipper itself or an economically linked entity:

1. has informed the final consumer that it will undertake that shipment after it or an economically linked entity has stocked the goods for that purpose?

2. has previously made an active contribution to the display of an advertisement for the goods bearing that sign or has taken the final consumer's order on the basis of that advertisement?

The references can be found here and here.

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LABOUR LAW

Digital Platform for Single Residence and Work Permit Applications Launched on 31 May 2021

In January 2019, Belgium implemented the ***EU Single Permit Directive*** for non-EEA citizens seeking to work in Belgium for more than 90 days (*Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State*). These rules created a single application procedure that gives rise to a combined work and residence authorisation in one document: the single permit.

Before 31 May 2021, each region in Belgium with jurisdiction over single permits applied its own set of rules in the framework of a single permit application. For example, there were regional differences in the way an application for a single permit had to be submitted (*e.g.*, by e-mail in Flanders and by registered mail in Brussels) and which application form had to be used.

As of 31 May 2021, employers who wish to employ non-EEA citizens in Belgium beyond 90 days can apply for a single permit online, via the new digital platform 'Working in Belgium' (click here), regardless of the competent region.

The digital platform includes (i) the easier gathering and exchange of information by and between the authorities involved in single permit processing; (ii) the automatic transfer of data to the competent region; (iii) fast uploading capacity and storage of documents; and (iv) automated status updates for all stakeholders.

In a first phase, the digital platform will be available only for single permit applications for the employment in Belgium of non-EEA employees in excess of 90 days. Other applications (*e.g.*, a professional card application for self-employed consultants) cannot be submitted via the platform. However, the use of the digital platform will be expanded to cover other types of applications in 2022.

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LITIGATION

Royal Decree Introducing Written Procedure as General Rule in Administrative Litigation Section of Council of State Gets Published

On 3 May 2021, the Belgian Official Journal published a Royal Decree of 26 April 2021 "amending Articles 26 and 84/1 of the Regent's Decision of 23 August 1948 establishing the procedure before the administrative litigation section of the Council of State" (the ***Royal Decree***).

The Royal Decree introduces a legal basis for handling cases without a public hearing on the basis of written submissions before the administrative litigation section of the Council of State. The new rule will apply to all cases unless at least one party objects and requests a public hearing. For further background on the Royal Decree, *see*, this Newsletter, Volume 2020, No. 12, p. 18.

The Royal Decree entered into force on 13 May 2021.

European Commission Rejects UK Application to Join Lugano Convention

On 4 May 2021, the European Commission (the ***Commission***) published a communication which recommends that the European Union (the ***EU***) should not approve the United Kingdom's (***UK***) application to accede to the 2007 Lugano Convention (*Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*; the ***Lugano Convention***).

The Lugano Convention governs international jurisdiction and the enforcement of judgments in civil and commercial matters between the EU Member States and three of the European Free Trade Association (***EFTA***) States, notably Iceland, Switzerland and Norway.

In its communication to the European Parliament and the Council of the European Union, the Commission indicated that the Lugano Convention is intended to apply solely to third countries that have a particularly close regulatory integration with the EU and that "*participate, at least partly, in the EU's internal market*". This is the case for countries that are part of the European Economic Area. By deciding to leave the EU and the Single Market, the UK has, in the view of the Commission, become a "*third country without a special link to the internal market*". As a result, the Commission considers that future civil judicial cooperation between the EU and the UK should be governed by the multilateral Hague Conventions, in line with the EU policy towards all third countries.

The Commission recommendation is non-binding and the final decision on the UK accession rests with the Council of the European Union.

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VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com